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No. 82-387

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

GERALD V. CONROD, JR.,

Petitioner,

vs.

JEEP CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 12; DOMINIC J. MATTONI; BOOKER HARRIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	(i)
Certificate and Proof of Service	(iii)
Introduction	1
Argument	2
I. THIS COURT'S VACA V. SIPES STANDARD AGAINST WHICH A COLLECTIVE BARGAINING REPRESENTATIVE'S DUTY OF FAIR REPRESENTATION IS MEASURED IS BOTH EXPLICIT AND CONSISTENTLY APPLIED.	4
II. THE STANDARDS FOR EVALUATING RACIAL DISCRIMINATION AND "REVERSE RACIAL DISCRIMINATION" UNDER BOTH TITLE VII AND 42 U.S.C. SECTION 1981 ARE APPARENT FROM THIS COURT'S RECENT DECISIONS INCLUDING MCDONALD V. SANTA FE TRAIL TRANSPORTATION COMPANY.	6
III. THE FEDERAL RULES OF CIVIL PROCEDURE ADEQUATELY ADDRESS AND GOVERN THE DISTRICT COURT'S RESPONSIBILITIES WITH REGARD TO CONFORMING THE PLEADINGS TO THE EVIDENCE AND WITH REGARD TO GRANTING SUMMARY JUDGMENT MOTIONS.	9

TABLE OF CONTENTS - (cont.)

		Page
IV.	THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE RELEVANT CASE APPLICATIONS ADEQUATELY ADDRESS AND GOVERN THE RIGHTS AND DUTIES OF THE COURTS OF APPEALS WITH REGARD TO CONSIDERATION OF MOTIONS TO AMEND THE PLEADINGS.	10
V.	THE ALLOCATION OF THE BURDEN OF PROOF AS TO THE ADEQUACY OF EXHAUSTING INTRA-UNION REMEDIES PRIOR TO INSTITUTING A SECTION 301 ACTION WAS NOT AND IS NOT RELEVANT TO THE FACTS AT ISSUE.	13
VI.	THE FEDERAL RULES OF CIVIL PROCEDURE ADEQUATELY ADDRESS AND GOVERN THE TRIAL COURT'S RESPONSIBILITIES WITH REGARD TO MOTIONS UNDER RULES 56 AND 59.	15
Conclusion		17

TABLE OF AUTHORITIES

	Page
Federal Cases	
Bobo v. ITT Continental Baking Company, 662 F. 2d 340 (5th Cir., 1981), cert. den. 102 S. Ct. 1985 (1982)	7
DeArroyo v. Sindicato DeTrabajadores Packinghouse, 425 F. 2d 281 (1st Cir.), cert. den. 400 U.S. 877 (1970)	5
Fiedler v. Marumsco Christian School, 631 F. 2d 1144 (4th Cir., 1980)	7
Ford Motor Company v. Hoffman, 345 U.S. 330 (1953)	5
Griffin v. UAW, 469 F. 2d 181 (4th Cir., 1972)	5
Hines v. Anchor Motor Freight, 424 U.S. 554 (1976)	5
Local No. 13 v. Pacific Maritime Association, 441 F. 2d 1061 (9th Cir., 1971), cert. den. 404 U.S. 1016 (1972)	5
McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976)	6, 7, 8
Occhino v. Northwestern Bell Telephone Company, 675 F. 2d 220 (8th Cir.), cert. den. 102 S. Ct. 2971 (1982)	7
Ruzicka v. General Motors Corp., 523 F. 2d 306 (6th Cir., 1975)	5
Tangren v. Wackenhut Services, 658 F. 2d 705 (9th Cir., 1981), cert. den. 102 S. Ct. 1771 (1982)	7
Torre v. Barry, 661 F. 2d 1371 (D.C. Cir., 1981)	7
Vaca v. Sipes, 386 U.S. 171 (1967)	4

TABLE OF AUTHORITIES - (cont.)

	Page
United States Supreme Court Rules	
U.S. Supreme Court Rule 17.1	2, 17
U.S. Supreme Court Rule 22	1
U.S. Supreme Court Rule 29.1	1
U.S. Supreme Court Rule 33	1
Federal Rules of Civil Procedure Rules	
Federal Rules of Civil Procedure Rule 15(b)	9, 10
Federal Rules of Civil Procedure Rule 56	9, 15
Federal Rules of Civil Procedure Rule 59	15
Statutes	
29 U.S.C. Section 185	13
42 U.S.C. Section 1981	6, 7
42 U.S.C. Section 2000e et seq. (Title VII of the Civil Rights Act of 1964)	6

CERTIFICATE AND PROOF OF SERVICE

Three copies of Respondent's brief in opposition to the petition for a writ of certiorari have been mailed to the following counsel of record:

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INTRODUCTION

Petitioner Gerald V. Conrod filed his petition for writ of certiorari on September 2, 1982. A copy of said petition was received by Respondent Jeep Corporation on September 3, 1982. In light of the unusual style and arguments made on behalf of the Petitioner, Respondent Jeep Corporation finds it necessary to file this short brief in opposition to the petition for certiorari. This brief is intended to comport with the United States Supreme Court Rules, specifically Rules 22 and 33. The time for filing this brief pursuant to Rule 29.1 has not expired.

ARGUMENT

"A review on writ of certiorari ... will be granted only when there are special and important reasons therefor." United States Supreme Court Rules, Rule 17.1. This Court has identified the following as reasons sufficient to justify granting the writ: (a) conflict among the federal courts of appeals, (b) conflict between a federal court of appeals and a state court of last resort on a federal matter, (c) departure of a federal court of appeals from the usual course of judicial proceedings so as to call for an exercise of judicial supervision, (d) conflict between state courts of last resort, or (d) the case presents an important and unsettled question of federal law. See Rule 17.1(a)-(c).

The instant petition for writ of certiorari fails to demonstrate, and respondent Jeep Corporation is unaware of, any conflict between or among the federal courts or the high state courts. Similarly, the proceedings at the Court of Appeals level were handled

with the efficiency and dignity expected of courts of appeals.

The petition for certiorari asserts that "both the discharged employee and the union will benefit from the direction this case can afford." Petition at 23. However, because the petition, in effect, requests a ruling on the facts unique to this case, the benefit is limited to the parties at issue. Thus, the petition for writ of certiorari presents no important and unsettled question of federal law. Instead, a question of fact decided by the District Court and reviewed and affirmed by the Court of Appeals for the Sixth Circuit is presented for review. Reconsideration by this Court would serve only to re-explore factual disputes of significance only to the immediate parties.

I.

THIS COURT'S VACA V. SIPES STANDARD AGAINST WHICH A COLLECTIVE BARGAINING REPRESENTATIVE'S DUTY OF FAIR REPRESENTATION IS MEASURED IS BOTH EXPLICIT AND CONSISTENTLY APPLIED.

Petitioner contends as reason for granting his petition for writ of certiorari that this Court has failed to adequately address the scope of a union's duty to investigate a grievance. That duty to investigate, however, is but one of the various responsibilities associated with the duty of fair representation undertaken when a union assumes its status as a collective bargaining representative. This Court has, on numerous occasions, addressed the issue of a collective bargaining representative's duty of fair representation.

This Court dictated the legal standard against which a statutory bargaining agent's conduct is measured in Vaca v. Sipes, 386 U.S. 171 (1967) wherein it stated:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bar-

gaining unit is arbitrary, discriminatory or in bad faith." 386 U.S. at 190. See also, Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

This Court has also recognized that

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit that it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion". Ford Motor Company v. Hoffman, 345 U.S. 330, 338 (1953).

These guidelines governing the conduct of bargaining representatives have been universally implemented in the litigation of claims alleging breaches of the duty of fair representation. See, e.g., Ruzicka v. General Motors Corp., 523 F. 2d 306 (6th Cir., 1975); Griffin v. UAW, 469 F. 2d 181 (4th Cir., 1972); Local No. 13 v. Pacific Maritime Association, 441 F. 2d 1061 (9th Cir., 1971) cert. den. 404 U.S. 1016 (1972); DeArroyo v. Sindicato DeTrabajadores Packinghouse, 425 F. 2d 281 (1st Cir.), cert. den. 400 U.S. 877 (1970).

II.

THE STANDARDS FOR EVALUATING RACIAL DISCRIMINATION AND "REVERSE RACIAL DISCRIMINATION" UNDER BOTH TITLE VII AND 42 U.S.C. SECTION 1981 ARE APPARENT FROM THIS COURT'S RECENT DECISIONS INCLUDING MCDONALD V. SANTA FE TRAIL TRANSPORTATION COMPANY.

The petition for a writ of certiorari asserts that the judiciary needs direction as to what constitutes "reverse racial discrimination". While counsel for petitioner cites this Court's decision in McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976), he fails to evaluate the impact of the Court's ruling.

As noted in McDonald v. Santa Fe, the provisions of Title VII, 42 U.S.C. Section 2000e, et seq., are not limited to discrimination against members of any particular race. Instead, the Act protects an individual from discrimination because of his race, irrespective of the racial category. 427 U.S. at 278-79. Similarly, with regard to discrimination against whites and the effect of 42 U.S.C. Section 1981, this Court stated in McDonald v. Santa Fe, "Our examination

of the language and history of Section 1981 convinces us that Section 1981 is applicable to racial discrimination in private employment against white persons." 427 U.S. at 287.

As would be expected, the federal courts have completely accepted the position taken by this Court and have held Title VII and Section 1981 to be similarly applicable to both blacks and whites. See, e.g., Occhino v. Northwestern Bell Telephone Company, 675 F. 2d 220 (8th Cir.) cert. den. 102 S. Ct. 2971 (1982); Bobo v. ITT Continental Baking Company, 662 F. 2d 340 (5th Cir., 1981) cert. den. 102 S. Ct. 1985 (1982); Torre v. Barry, 661 F. 2d 1371 (D.C. Cir., 1981); Tangren v. Wackenhut Services, 658 F. 2d 705 (9th Cir., 1981) cert. den. 102 S. Ct. 1771 (1982); and Fiedler v. Marumsco Christian School, 631 F. 2d 1144 (4th Cir., 1980). Thus, once again, there is no apparent conflict among the courts as to the legal standards and analyses appropriate in evaluating claims of race discrimination. In addition, the ques-

tion posed to this Court in Part II of the petition parallels the issues and analyses presented seven years ago in McDonald v. Santa Fe, supra.

III.

THE FEDERAL RULES OF CIVIL PROCEDURE ADEQUATELY ADDRESS AND GOVERN THE DISTRICT COURT'S RESPONSIBILITIES WITH REGARD TO CONFORMING THE PLEADINGS TO THE EVIDENCE AND WITH REGARD TO GRANTING SUMMARY JUDGMENT MOTIONS.

Part III of the petition for certiorari presents the Court with the questions of a trial court's duty to consider evidence not pleaded and the trial court's duty to grant leave to file an amended pleading before ruling on a motion for summary judgment.

As cited by the Petitioner, Rule 15(b) of the Federal Rules of Civil Procedure directly addresses the issue framed and provides the district courts with the appropriate guidance. Rule 56 of the Federal Rules of Civil Procedure similarly addresses Petitioner's concerns. Thus, there is no reason for this Court to mechanically evaluate the application of these rules to the facts of this case, especially since Petitioner has not asserted and the Court of Appeals found no abuse or misuse of the rules of procedure on the part of the District Court.

IV.

THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE RELEVANT CASE APPLICATIONS ADEQUATELY ADDRESS AND GOVERN THE RIGHTS AND DUTIES OF THE COURTS OF APPEALS WITH REGARD TO CONSIDERATION OF MOTIONS TO AMEND THE PLEADINGS.

Part IV of the petition for certiorari asserts that the Court of Appeals "has both the right and duty to consider and rule upon a motion to amend the pleadings to conform to the evidence adduced below." Petition for certiorari at 30. Respondent Jeep concurs. The Court of Appeals has the right to consider all evidence adduced at the District Court level and may consider the pleadings amended insofar as the record supports such amendment, as permitted by Rule 15(b) of the Federal Rules of Civil Procedure.

Petitioner, however, failed to provide the Court of Appeals with evidence to justify considering the pleadings amended. Petitioner argued to the Court of Appeals that the issue of "reverse racial discrimination" was before the Court. However, in the Court of

Appeal's order of May 25, 1982 denying the petition for rehearing, the Court stated:

> "Filing a charge with the EEOC is not a prerequisite to suit under Section 1981. However appellant is still entitled to no relief on appeal. He did not fairly raise this cause of action prior to entry of judgment by the District Court. His complaint does not mention racial discrimination and in context the sporadic references to race in appellant's other prejudgment pleadings are insufficient to put the parties or District Court on notice that racial discrimination was a ground on which appellant claimed relief. In fact in his deposition appellant states that he is not claiming that he was discriminated against.
>
> "Further, even if the discrimination issue was raised, appellant offered only the most conclusory statements in support thereof prior to judgment. Such conclusory allegations are not sufficient to withstand appellee's motions for summary judgment under F.R.Civ.P. 56.
>
> "Finally, there is not such evidence of racial discrimination in appellant's post-judgment Rule 59 motion for us to find the District Court's refusal to vacate or amend its judgment was error, much less an abuse of discretion. Accordingly, construing appellant's discrimination claim as arising under Section 1981, we still are not persuaded to reverse the District Court's entry of summary judgment in favor of appellees." (emphasis added)

The Court of Appeals for the Sixth Circuit, therefore, obviously considered Petitioner's motion that his complaint be amended to conform to the evidence adduced at the District Court level. The Court of Appeals also, however, found that evidence insufficient to support granting such a motion to amend the pleadings.

V.

THE ALLOCATION OF THE BURDEN OF PROOF AS TO THE ADEQUACY OF EXHAUSTING INTRA-UNION REMEDIES PRIOR TO INSTITUTING A SECTION 301 ACTION WAS NOT AND IS NOT RELEVANT TO THE FACTS AT ISSUE.

Part V of the petition for certiorari raises the question concerning which party bears the burden of proof as to the issue of the exhaustion of intra-union appeals. Petitioner asserts that the issue has not been decided by this Court and further asserts that the employer and union should bear the burden of proof as to the issue.

Without commenting on the merits of Petitioner's claim, we respectfully contend that this issue should not be before the Court. Petitioner has never raised a substantial argument opposing Respondents' affirmative defense that the mandatory intra-union appeal was never taken. In fact, petitioner filed an affidavit in the District Court in which he stated that he did not attempt his intra-union appeal because he thought it would take too long and because his previous attorney advised him that he had no such appeal. Both the

District Court and the Court of Appeals rejected this as an acceptable basis for his failure to exhaust. Thus, the question of which party bears the burden of proof as to the exhaustion of intra-union appeals is not an issue before this Court.

In addition, even under his theory of allocation, Petitioner has set forth no facts in these proceedings which indicate that the lower courts improperly delegated the burden of proof. Both the Court of Appeals and the District Court opinions recognized that no evidence was offered to contradict or mitigate petitioner's failure to exhaust. Both Respondents raised the affirmative defense that Petitioner failed to exhaust his intra-union remedies. The Petitioner's only response was to admit such failure and to offer a justification which neither the District Court nor the Court of Appeals found sufficient.

VI.

THE FEDERAL RULES OF CIVIL PROCEDURE ADEQUATELY ADDRESS AND GOVERN THE TRIAL COURT'S RESPONSIBILITIES WITH REGARD TO MOTIONS UNDER RULES 56 AND 59

In Part VI of the petition for certiorari, the Petitioner maintains that affidavits filed with the Rule 59 motion to alter or amend the judgment after summary judgment was entered should have been considered in ruling upon the motion for summary judgment. The District Court and the Court of Appeals for the Sixth Circuit obviously agreed with the Petitioner's position.

In the order issued by the District Court on October 31, 1980 in response to Petitioner's Rule 59 motion, the District Court addressed the post-summary judgment affidavits and evidence stating:

> "The matters with which the plaintiff now approaches the Court raise some new conclusory allegations, but essentially embellish the evidence and allegations which have been previously filed herein. ... Upon careful review of the proceedings herein, the Court is not disposed to disturb its prior rulings or the resultant judgment entries."

Similarly, upon appeal to the Court of Appeals alleging error, the Court of Appeals stated in its opinion dated March 4, 1982:

> "The only issue appellant raises that arguably challenges this finding is the last—that the post-judgment affidavit submitted to the court stated a claim for relief. The only evidence helpful to appellant in the affidavit is a claim that several other employees were not fired for doing similar acts. This evidence, which if true still does not establish that appellant was not fired for just cause, does not warrant reversing the District Court's grant of summary judgment." (emphasis added)

Thus, the relevant additional evidentiary filings were considered and rejected by the District Court and were similarly reviewed and rejected by the Court of Appeals. Petitioner's writ to this Court complains not of misapplication of legal procedure but of the adverse determination on the facts resulting from proper application of the proper procedure.

CONCLUSION

This Court has determined that certiorari will be granted "only when there are special and important reasons therefor." Rule 17.1. While this case is of some special importance to the immediate parties, its resolution is neither of important national consequence, nor will it involve consideration of unique and important legal issues. The six questions presented by the Petitioner for review are each subject to ascertainable and workable legal standards or court rules announced or approved by this Court. There are no demonstrable conflicts between courts of different forums with regard to any of the question presented. Further, the Petitioner has demonstrated no abuse or misuse of procedures by the Court of Appeals, nor has it demonstrated unchecked error on the part of the U.S. District Court.

For all of these reasons, the Respondent Jeep Corporation respectfully prays that this Court decline to exercise its appellate jurisdiction and that it

deny the Petitioner's request for a writ of certiorari.

Respectfully submitted,

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Dated: September 1, 1982